SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 635

ROBERT VINCENT GARDNER,
Appellant,

v.

VINCENT L. BRODERICK as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC. AS *AMICUS CURIAE*

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Interest of *Amicus*

The Patrolmen's Benevolent Association of the City of New York, Inc. ("P.B.A.") is a line organization of the New York City Police Department and is certified by the City of New York as the exclusive bargaining representative of the Department's 28,000 patrolmen. The PBA is interested in all matters affecting the welfare and the rights and interests of New York City patrolmen.

The appellant herein, Robert Vincent Gardner, is a former patrolman of the New York City Police Department who was discharged for refusing to waive his Fifth Amendment privilege before a Grand Jury. The P.B.A. is interested in his case because it raises a question of major significance for New York City policemen as well as for public employees generally: namely, whether waiver of the privilege against self-incrimination can be made a valid condition of a public job.

ARGUMENT

Dismissal of the appellant from the New York City Police Department for refusing to waive his constitutional privilege against self-incrimination violated the Fifth Amendment to the United States Constitution. The provisions of the New York State Constitution and New York City Charter requiring such dismissal are unconstitutional.

The Fifth Amendment to the Constitution of the United States provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." The appellant, Robert Vincent Gardner, appeared pursuant to a subpoena before a Grand Jury investigating an alleged gambling conspiracy involving New York City policemen. He was warned "that under the Constitution of the State of New York,* as well as the Charter of the City of New York,* that a public officer, which includes a police officer, when called before a Grand Jury to answer questions concerning the conduct of his public office and the performance of his duties is required to sign a waiver of immunity if he wishes to retain that public office" (A 20). Gardner refused to sign such a waiver of immunity and was excused without being questioned. Thereafter, he was discharged from his position in the Police Department for the sole reason that he had refused to sign a waiver of immunity as required by Section 1123 of the New York City Charter (A 34). *Amicus* supports appellant's contention that his discharge violated his rights under the Fifth Amendment.

In *Malloy* v. *Hogan*, 375 U.S. 1, 8 this Court said:

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth

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* The pertinent provisions of Article 1, Section 6 of the Constitution of the State of New York and Section 1123 of the New York City Charter, here in issue, are reprinted in the Appendix to Appellant's Brief.

> Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty . . . for such silence."

Commenting on this rule, Mr. Justice Douglas, writing for the Court in *Spevack* v. *Klein*, 385 U.S. 512, 515 stated:

> "In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin* v. *California*, 380 U.S. 609, the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly'."

The appellant herein faced a choice similar to the one condemned by this Court in *Garrity* v. *State of New Jersey*, 385 U.S. 493, 497:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty for self-incrimination is the antithesis of free choice to speak out or to remain silent."

The choice the appellant faced was indeed harsher than the one given the police officers in *Garrity*. He was not merely directed to testify but was asked, before testifying, to sign a waiver of immunity from criminal prosecution based on his testimony. In short he was asked to waive the very rights secured to him by the decision of this Court in *Garrity* v. *State of New Jersey, supra*.

In *Garrity*, police officers called before a Deputy Attorney General empowered to investigate an alleged scheme to fix traffic tickets, were warned that they had the right to remain silent but that they were subject to discharge under New Jersey law if they exercised their Fifth Amendment privilege. This Court ruled that their testimony under such circumstances was involuntary and could not be used against them in subsequent criminal proceedings. The

Court reserved the question, as noted in the companion *Spevack* case, "whether a policeman, who invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify . . ." (385 U.S. at 516, n. 3) but the present case is not within the ambit of the question thus reserved. The present appellant did not decline to answer questions about his official conduct put to him by a superior officer in disciplinary proceedings. As in *Garrity*, he was being interrogated by a body outside the Police Department charged with developing evidence for the purpose of criminal prosecution. The outside body was a Grand Jury whose specific purpose it was to investigate and indict policemen for criminal acts; and it was conceded by the Assistant District Attorney that the appellant was a potential defendant (A 30, 31). Furthermore, as previously noted, the appellant was not merely called upon to testify but was directed before testifying to sign a written waiver of immunity from prosecution based on his testimony. It was specifically and solely for his refusal to sign the waiver of immunity that the appellant was discharged (A 34).

In the present case there was a Police Department disciplinary hearing, but it was directed at one question and one question alone: whether the appellant had in fact declined to sign a waiver of immunity upon request to do so before a Grand Jury. Patrolman Gardner's attorney specifically requested that the hearing not be limited to this question and that the charges of misconduct pending against Gardner be tried at the same time (A 25). His request was denied. The only testimony taken at the hearing related to the charge that Garner had declined to sign a waiver of immunity. The Trial Commissioner's report to the Police Commissioner concluded that "Gardner refused to waive immunity from prosecution as required by Section 1123 of the New York City Charter. It is therefore recommended that the employment of the said suspended Patrolman Robert

V. Gardner be terminated and his office vacated as of August 5, 1965" (A 33). The Police Commissioner then issued the following order discharging Gardner:

> "Suspended Patrolman Robert V. Gardner, Shield #18984, 5th Precinct, having appeared before the Grand Jury of New York County on the 6th day of August, 1965, and having refused to waive immunity from prosecution as required by Section 1123 of the New York City Charter, and a hearing having been held in connection therewith, his employment in the Police Department of the City of New York is terminated and his office vacated effective August 6, 1965.
>
> /s/ Vincent L. Broderick*
> VINCENT L. BRODERICK
> Police Commissioner
>
> Dated: August 11, 1965"

Even under the principles espoused by the dissenting minority in *Garrity* v. *State of New Jersey*, it is recognized that it is improper for a police officer's discharge to be "predicated on an imputation of guilt drawn from the use of the privilege", 385 U.S. at 508 (dissenting opinion of Harlan, J.). The dissenting Justices, while unwilling "to assume that discharges will be used either to vindicate impermissible inferences of guilt or to penalize privileged silence . . ." (385 U.S. at 509) recognized that such use of the penalty of discharge is constitutionally impermissible. In the present case, it is clear that Gardner's discharge was predicated on nothing else but his refusal to surrender his Fifth Amendment privilege and was ex-

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* Vincent L. Broderick, former Police Commissioner of the City of New York, and one of the named defendants in the present suit, is now a member of the firm of Phillips, Nizer, Benjamin, Krim & Ballon, which firm is of counsel to the Patrolmen's Benevolent Association of the City of New York, Inc. as *amicus curiae* herein. Mr. Broderick has had no connection with this *amicus* appearance and obviously disassociates himself from the position taken in this brief.

pressly intended to penalize his silence. Section 1123 of the New York City Charter, directing that upon a refusal to waive immunity, the term of office of any officer or employee of the City "shall terminate and such office or employment shall be vacant" and Article 1, Section 6 of the New York State Constitution providing that any public officer who refuses to waive immunity before a Grand Jury "shall by virtue of such refusal, be disqualified from holding any other public office or employment for a period of five (5) years, and shall be removed from office by the appropriate authority . . ." are by their terms expressly intended to impose a penalty for privileged silence, without leaving room for the kind of "effort in good faith to assess . . . qualifications" of a public employee which Mr. Justice Harlan would have allowed in *Spevack* v. *Klein* (see 385 U.S. at 528) and *Garrity* v. *State of New Jersey* (see 385 U.S. at 508).

The rights secured by the *Garrity* case would be illusory if they could be circumvented by using the threat of discharge to extract a waiver. Whereas a statute providing for forfeiture of office upon refusal to testify presents a harzard to the integrity of the Fifth Amendment privilege which may perhaps be partially avoided by excluding the use by prosecuting authorities of information obtained by threats of dismissal (see *Spevack* v. *Klein*, 385 U.S. at 528 (opinion of Harlan, J.), 385 U.S. at 532 (opinion of White, J.)), this cannot be said of a law which uses the threat of discharge to force a public officer to waive such immunity from subsequent prosecution based on his testimony.

The New York Court of Appeals, in its decision below, appears to have assumed that the waiver, if signed, would have been invalid. The Court of Appeals stated that "If the petitioner before us had executed the waiver required by Section 1123 and then testified about misconduct in office, his testimony, *though inadmissible in a criminal*

prosecution, would, nevertheless, have furnished sufficient cause to justify his dismissal from the police force" (A 43) (emphasis added). It is clear, however, that the prosecuting authorities did not believe that the appellant, if he had signed a waiver and testified, would have remained immune from criminal prosecution. In referring Gardner's case to the Police Commissioner, the Assistant District Attorney expressly stated that Gardner was not questioned after he declined to sign the waiver because "it was not the intention of the District Attorney to request the Grand Jury to confer immunity upon him" (A 11-12). The appellant had reason to fear (as the State had reason to hope) that the waiver would have the effect obviously intended by New York Law: to permit appellant's criminal prosecution based on his own testimony. Such a result is repugnant to principles accepted by all of the Justices in *Garrity* and *Spevack.*

This Court has rejected the theory also relied upon by the New York Court of Appeals below, that "Although people in public office and on public payroll may not be compelled to surrender their constitutional privilege against self-incrimination . . . they have no constitutional right to remain in office when they refuse to discuss with frankness and candor whether they have faithfully performed their duties" (A 44). As this Court stated in *Garrity* v. *New Jersey,* 385 U.S. at 499:

> "The question in this case, however, is not cognizable in those terms. Our question is whether the Government, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against the employee.
>
> We held in Slochower v. Board of Education, 350 U.S. 551, that a public school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege against self-incrimination when questioned by a congressional committee
>
> . . .
>
> We conclude that policemen, like teachers and lawyers are not relegated to a watered-down version of constitutional rights."

Similarly, this Court stated in *Spevack* v. *Klein*, 385 U.S. at 516:

> "We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words 'No person . . . shall be compelled in any criminal case to be a witness against himself'; and we can imply no exception. Like the school teacher in Slochower v. Board of Education, 350 U.S. 551, and the policeman in Garrity v. New Jersey, 385 U.S. 493, lawyers also enjoy first-class citizenship."

It would be difficult for policemen to understand a theory of constitutional law which deprives them of a constitutional privilege extended to teachers, lawyers and all others on the ground that policemen have a higher standard of duty to the public. It should indeed be difficult for lawyers and teachers to accept such a theory. While *amicus* fully subscribes to the proposition that police officers owe the highest measure of devotion to their sworn duty to uphold the law, it does not follows from this proposition that enforcement of that high standard requires a zealotry which sweeps aside constitutional rights. Nor does the public's claim to protection require such a sacrifice. Unlike lawyers, who may continue in unrestricted practice and even assume judicial office after invoking the Fifth Amendment, a policeman is subject to more stringent controls. He may be temporarily suspended or confined to non-sensitive duties upon mere suspicion, while appropriate agencies investigate the facts. The continuance of his salary while lawful avenues of investigation are pursued is the only price which need be paid by the public for respecting the constitutional rights of a policeman, as he is required to respect and enforce the similar rights of all citizens.

Even if it were proper, however, to single out police officers and to withdraw from them the right "to remain silent . . . and to suffer no penalty . . . for such silence"

(*Malloy* v. *Hogan*, 378 U.S. 1, 8) this Court has held that such discriminatory treatment cannot extend so far as to permit a police officer to be criminally prosecuted on the basis of evidence extracted from him on pain of discharge. *Garrity* v. *State of New Jersey, supra. Amicus* submits that it necessarily follows that the State of New York may not use the threat of discharge to compel a policeman to waive that very immunity from prosecution based on testimony thus extracted. Appellant's dismissal for refusing to waive such immunity violated his rights under the Fifth Amendment. The provisions of the New York City Charter and New York State Constitution requiring such dismissal are unconstitutional and therefore invalid.

Conclusion

The decision of the New York Court of Appeals should be reversed. Article 1, section 6 of the New York State Constitution and section 1123 of the New York City Charter are unconstitutional and should be so declared by this Court. Appellant should be restored to his position as a patrolman in the New York City Police Department.

Respectfully submitted,

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